

MEMORANDUM OF LAW

DATE: July 25, 1995

TO: Councilmember Barbara Warden

FROM: City Attorney

SUBJECT: Emergency Ordinance - Rezone of 11607 Duenda Road -
Proposed Taco Bell Restaurant

In response to your attached memorandum and as I noted in an earlier memorandum on this subject, City Charter section 17 provides the basic controls applicable to the City Council with regard to emergency ordinances. An emergency ordinance requires a two-thirds vote of the Council and can be utilized only "to provide for the emergency preservation of the public peace, property, health, or safety." The Charter further specifies: "No situation shall be declared an emergency except as defined in this section, and it is the intention of this Charter that compliance with such definition shall be strictly construed by the courts."

The Municipal Code section 111.0807 does provide for "interim emergency zoning" where a change of zone has been initiated and the City Council determines:

- (1) a development may be inconsistent with the zoning initiated by the City or would preempt the City's ability to implement adopted plans and policies; and
- (2) a development would be detrimental to the public health, safety, or general welfare; and
- (3) the development appears imminent.

The Municipal Code section specifies that such an emergency zoning ordinance is effective immediately and remains in effect for 180 days.

The Municipal Code section appears to be based on state Government Code section 65858. Government Code section 65800 et seq. provide the general zoning regulations to be followed by general law cities.

Section 65803 specifies ". . . This chapter shall not apply to a charter city, except to the extent that the same may be adopted by charter or ordinance of the city."

Section 65858 is entitled "Urgency measure: Interim Zoning Ordinance" and authorizes as an urgency measure "an interim ordinance prohibiting any uses which may be in conflict with a contemplated general plan, specific plan or zoning proposal which the legislative body . . . is considering or studying or intends to study within a

reasonable time."

Section 65858 specifies: "That urgency measure shall require a four-fifths vote of the legislative body for adoption.", and that "the interim ordinance shall be of no further force and effect 45 days from its date of adoption" with provision for extensions.

The section also specifies that no such ordinance shall be adopted "unless the ordinance contains a finding that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use . . . would result in that threat to public health, safety, or welfare."

Since the City's ordinance requires only a two-thirds vote, rather than four-fifths, and is in effect for 180 days, rather than 45 days, any such emergency ordinance must meet the City Charter requirements to qualify as a bona fide emergency ordinance.

It must be emphasized that an emergency ordinance under our Charter, if it is to be legally supportable, must involve a serious threat to the public health, safety and general welfare and that any person or persons supporting an emergency ordinance must be able to provide facts to support the findings.

For example, to my knowledge there has not been a factual situation in San Diego where a Taco Bell in operation actually was determined to constitute a threat to the public health, safety or welfare. There must be substantial evidence to support a finding that this proposed Taco Bell operation would create such a threat.

Also, it is my understanding that the owners of the Taco Bell in question have already obtained all permits they need to convert the existing drive-thru bank building to a drive-thru restaurant. If such is in fact the case, the act of rezoning the property on an emergency basis, even if there are facts to support the necessary findings, would not preclude the Taco Bell in question from completing improvements under already issued permits and commencing operation.

JOHN W. WITT, City Attorney

By

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Chief Deputy City Attorney

HOV:ps:630

Attachment

ML-95-47